UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NATIVIDAD A. RODRIGUEZ, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	CASE NO. C12-0694-TSZ-MAT REPORT AND RECOMMENDATION

Plaintiff Natividad A. Rodriguez appeals the final decision of the Commissioner of the Social Security Administration ("Commissioner") which denied her application for Disability Insurance Benefits ("DIB") under Title II of the Social Security Act, 42 U.S.C. §§ 401-33, after a hearing before an administrative law judge ("ALJ"). For the reasons set forth below, the Court recommends that the Commissioner's decision be REVERSED and REMANDED for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was born in 1960 and was 46 years old on the date last insured. (Administrative Record ("AR") 177.) She has a high school education and previously worked

as a janitor, fast food worker, and teacher's assistant/child care attendant. (AR 18, 85, 209, 215.) On April 21, 2008, she filed an application for DIB, alleging disability beginning December 14, 2001. (AR 18, 177-78.)

The Commissioner denied plaintiff's application initially and on reconsideration. (AR 121-22.) She requested a hearing which took place on April 2, 2010. (AR 30-97.) On July 12, 2010, the ALJ issued a decision finding plaintiff not disabled. (AR 18-25.) The Appeals Council denied plaintiff's request for review (AR 1-5), making the ALJ's ruling the "final decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). On April 20, 2012, plaintiff timely filed the present action challenging the Commissioner's decision. (Dkt. 1.)

II. JURISDICTION

Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

III. DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. § 416.920. At step one, it must be determined whether the claimant has engaged in substantial gainful activity. The ALJ found plaintiff had not engaged in substantial gainful activity during the period from her alleged onset date of December 14, 2001, through her date last insured of December 31, 2006. (AR 20.) At step two, it must be determined whether the claimant suffers from a severe impairment. The ALJ found plaintiff's degenerative joint disease in both knees and bilateral epicondylitis severe. *Id.* Step three asks whether the claimant's impairments meet or equal the criteria of a listed

impairment. The ALJ found plaintiff's impairments did not meet or equal the criteria of a listed impairment. *Id*. If the claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity ("RFC") and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform

> less than a full range of light work as defined in 20 CFR 404.1567(b). She could lift/carry 10 pounds frequently and 20 pounds occasionally. She could stand/walk for no more than 1 hour at a time for a total of 6 hours in an 8 hour day. She had no sitting restrictions. She could occasionally bend, stoop, and crouch. She could not kneel, crawl, or balance. She could not work at unprotected heights and could not climb ladders, ropes, or scaffolds. She could occasionally climb stairs and ramps. She could occasionally operate foot pedals. She could frequently work overhead and reach in all directions with both upper extremities. She could perform frequent handling.

(AR 21.) With that assessment, the ALJ found plaintiff able to perform her past relevant work as a teacher's assistant/child care attendant as generally performed. (AR 24.)

If the claimant is able to perform her past relevant work, she is not disabled; if the opposite is true, then the burden shifts to the Commissioner at step five to show that the claimant can perform other work that exists in significant numbers in the national economy, taking into consideration the claimant's RFC, age, education, and work experience. In the alternative, the ALJ reached step five. Based on the testimony of a vocational expert, the ALJ found plaintiff able to perform a substantial number of unskilled jobs in the national economy and, therefore, to be not disabled. (AR 24-25.)

Plaintiff argues that the ALJ erred in finding her able to perform her past relevant work as a teacher's assistant/child care attendant as generally performed; in finding her able to perform other work as a semiconductor die loader, call out operator, and folder; in erroneously

rejecting the opinion of treating physician Ralph Haller, M.D.; and in failing to evaluate her obesity. (Dkt. No. 18 at 1-2.) Plaintiff also argues that the ALJ *de facto* reopened the initial denial of her prior application for benefits. *Id*. at 2. She requests remand for further administrative proceedings. *Id*. at 19. The Commissioner argues the ALJ's decision is supported by substantial evidence and should be affirmed. (Dkt. No. 22.)

Step Four

At step four, the claimant has the burden of showing that she is no longer able to perform her past relevant work. *Lewis v. Barnhart*, 281 F.3d 1081, 1083 (9th Cir. 2002) (citing *Pinto v. Massanari*, 249 F.3d 840, 844 (9th Cir. 2001)). The step four determination involves a comparison between the demands of the claimant's former work and her present capacity. *Villa v. Heckler*, 797 F.2d 794, 798 (9th Cir. 1986). A claimant cannot merely show that she is incapable of performing the particular job she once performed; she must prove that she cannot return to the same type of work. *Id.* at 798. If the claimant is unable meet her burden, that burden remains with her rather than shifting to Secretary to proceed with step five. *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993).

A person is not disabled if they are able to perform their past work. 20 C.F.R. § 404.1502(f). Social Security Ruling ("SSR") 82–61 describes the tests for determining whether or not a claimant retains the capacity to perform her past relevant work. One of the tests identifies that "where the evidence shows that a claimant retains the RFC to perform the functional demands and job duties of a particular past relevant job as he or she actually performed it, the claimant should be found to be 'not disabled.'" SSR 82–61. Another test is "[w]hether the claimant retains the capacity to perform the functional demands and job duties

of the job as ordinarily required by employers throughout the national economy." *Id.*

The *Dictionary of Occupational Titles* ("DOT") is the "best source for how a job is generally performed." *Pinto*, 249 F.3d at 845. In classifying prior work, the agency must keep in mind that every occupation involves various tasks that may require differing levels of physical exertion. It is error for the ALJ to classify an occupation "according to the least demanding function." *Valenica v. Heckler*, 751 F.2d 1082, 1086 (9th Cir. 1985). DOT descriptions "can be relied upon — for jobs that are listed in the DOT — to define the job as it is *usually* performed in the national economy." SSR 82–61. Thus, "if the claimant cannot perform the excessive functional demands and/or job duties actually required in the former job but can perform the functional demands and job duties as generally required by employers throughout the economy, the claimant should be found to be 'not disabled.'" *Id*.

A claimant's properly completed vocational report (SSA-3369-F6) may be sufficient to furnish information about their past work. *Id*. However, when significant variation exists between a claimant's description of her job and the DOT description of his job, it may be the result of a composite job. *Id.* A composite job has "significant elements of two or more occupations, and as such, ha[s] no counterpart in the DOT." *Id.* Composite jobs are evaluated "according to the particular facts of each individual case." *Id.*

Pursuant to SSR 00-4p, an ALJ has an affirmative responsibility to ask whether a vocational expert's testimony conflicts with the DOT, and, if there is a conflict, whether there is a reasonable explanation for such conflict. *Massachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007) ("[W]e address the question whether, in light of the requirements of SSR 00-4p, an ALJ may rely on a vocational expert's testimony regarding the requirements of a particular job

without first inquiring whether the testimony conflicts with the Dictionary of Occupational Titles. We hold than an ALJ may not."). As stated by the Ninth Circuit, "'[A]n ALJ may rely on expert testimony which contradicts the DOT, but only insofar as the record contains persuasive evidence to support the deviation.'" *Id*. at 1153 (quoting *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995)); *see also Pinto*, 249 F.3d at 847 ("We merely hold that in order for an ALJ to rely on a description in the [DOT] that fails to comport with a claimant's noted limitations, the ALJ must definitively explain this deviation.").

In this case, the ALJ found plaintiff capable of performing her past relevant work as a teacher's assistant/child care attendant as generally performed. (AR 24.) In support of this finding, the ALJ relied on vocational expert testimony regarding the demands of plaintiff's past relevant work as it is generally performed in the national economy. *Id*.

Plaintiff argues that substantial evidence does not support the ALJ's finding that she could perform her past relevant work as a teacher's assistant/child care attendant as generally performed. (Dkt. No. 18 at 6-11.) Specifically, plaintiff contends that the vocational expert's testimony conflicts with the information provided in the DOT, and the ALJ did not obtain a "reasonable explanation" for the conflict. (Dkt. No. 18 at 7-9.) Plaintiff points out that the DOT occupation the vocational expert identified, DOT 359.677-018, requires frequent stooping (from one-third to two-thirds of the time) and occasional kneeling (from very little up to one-third of the time), whereas the ALJ's hypothetical question to the vocational expert was limited to occasional stooping and prohibited kneeling. *See* SSR 83-10. (AR 21, 86-87.)

Plaintiff further contends that she did not have past relevant work as generally performed as a teacher's assistant/child care attendant because her job as a teacher's

assistant/janitor was a "composite" of two or more separate jobs. (Dkt. No. 18 at 9-10.) She asserts that because her job as a teacher's assistant/janitor was a composite, it does not have a DOT counterpart, and, therefore, cannot be considered work as generally performed in the national economy. *Id.*[1]

The Commissioner concedes that substantial evidence does not support the ALJ's step four decision, but asserts this error was harmless given that the ALJ made an alternate finding that plaintiff was not disabled at step five. (Dkt. No. 22 at 13.) The Court agrees that if the ALJ's step five finding is not in error, the ALJ's step four error is harmless. However, as discussed below, the Court finds substantial evidence does not support the ALJ's step five decision that plaintiff could perform other work in the national economy.

Step Five

At step five, the Commissioner bears the burden of showing that the claimant can perform other work that exists in significant numbers in the national economy, given the claimant's age, education, work experience, and RFC. *Tackett v. Apfel*, 180 F.3d 1094, 1100-01 (9th Cir. 1999). The Commissioner may meet this burden by referring to the Medical-Vocational Guidelines at 20 C.F.R. pt. 404, subpt. P, app. 2, or by eliciting the testimony of a vocational expert. *Id.* at 1101. In order for the vocational expert's testimony

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1 Plaintiff also contends that substantial evidence does not support the ALJ's reliance on the vocational expert's testimony for her step-four decision because the vocational expert cited DOT 359.677-018 for the occupation of "childcare attendant," but the ALJ cited DOT 259.677-018 as the listing for teacher's assistant/child care attendant. (Dkt. No. 18 at 7; AR 24, 85.) DOT 259.677-018 does not correspond with any occupation. The vocational expert cited the correct DOT number for the childcare attendant position, however, and the ALJ relied on the vocational expert's testimony in determining that plaintiff was not disabled. In light of the foregoing, the ALJ's reference to DOT 259.677-018 appears to be a harmless typographical error.

to constitute substantial evidence, the ALJ must pose a hypothetical "that reflects all the claimant's limitations." *Roberts v. Shalala*, 66 F.3d 179, 184 (9th Cir.1995). The ALJ's depiction of the claimant's impairments must be "accurate, detailed, and supported by the medical record." *Tackett*, 180 F.3d at 1101.

Plaintiff argues that the ALJ erred at in finding that she could perform other work because the other jobs identified – semiconductor die loader (sedentary work), call out operator (sedentary work), and folder (light work) – all exceeded the limitations imposed by the ALJ's RFC finding. (Dkt. No. 18 at 11-15.)

Sedentary Occupations: Semiconductor Die Loader and Call Out Operator

Plaintiff argues that the ALJ erred in finding that she could work as a semiconductor die loader and call out operator given the ALJ's finding that she could reach and handle only frequently.[2] (Dkt. No. 18 at 11.) The Commissioner concedes substantial evidence does not support the ALJ's finding that plaintiff could work as a semiconductor die loader, but contends the ALJ did not err in finding that plaintiff had the RFC to work as a call out operator. (Dkt. No. 22 at 14.)

The ALJ's RFC finding included a restriction to frequent reaching and handling (from one-third to two-thirds of the time). (AR 21.) The vocational expert testified that the job of call out operator requires only occasional reaching and handling (up to one-third of the time), and thus would not be precluded. DOT 237.367-014. However, she further testified that the job of call out operator "has changed since it was originally developed in the last DOT where

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2 "Reaching is "extending the hands and arms in any direction." SSR 85-15. "Handling" is "seizing, holding, grasping, turning or otherwise working primarily with the whole hand or hands." *Id*.

an individual would be doing more writing, this person would be doing more keyboarding. . . . So if one would like to consider keyboarding as a reaching level, it would be at the constant level." (AR 88.) Thus, by the vocational expert's own testimony, the call out operator job has changed to require constant reaching. Because plaintiff does not have the RFC to constantly reach, she is unable to work as a call out operator.

The Commissioner argues that the vocational expert testified that only "some" of the call out operator jobs have changed to require constant reaching. (Dkt. No. 22 at 15.) However, as plaintiff contends, the vocational expert did not testify about the number of call out operator jobs remaining, if any, that do not involve more than frequent reaching by virtue of the keyboarding demands. Accordingly, substantial evidence does not support the ALJ's finding that plaintiff could perform 950 jobs in Washington and 67,480 jobs nationally.

Light Occupations: Folder

Plaintiff argues that substantial evidence does not support the ALJ's finding that she could perform the "light" occupation of folder given the ALJ's finding that she could stand for no more than one hour at a time. (Dkt. No. 18 at 14-15; AR 21.) Specifically, plaintiff asserts that the vocational expert's testimony conflicted with the DOT, the vocational expert did not provide a reasonable explanation for the contradiction, and the ALJ did not explain how she resolved the conflict in the written decision.

The Agency and the DOT use the same definitions for exertional categories of work. *See* 20 C.F.R. § 404.1567 ("we classify jobs as sedentary, light, medium, heavy, and very heavy. These terms have the same meaning as they have in the Dictionary of Occupational Titles."). Under the DOT's definitions, "[s]edentary work involves sitting most of the time,

but may involve walking or standing for brief periods of time." U.S. Dep't of Labor, DOT (4th ed. rev. 1991), App. C, *available at* 1991 WL 688702; *see also* 20 C.F.R. § 404.1567(a). SSR 96-9p further provides, "In order to perform a full range of sedentary work, an individual must be able to remain in a seated position for approximately 6 hours of an 8-hour workday, with a morning break, a lunch period, and an afternoon break at approximately 2-hour intervals." SSR 96-9p.

SSR 83-12 similarly provides that light work requires "prolonged standing or walking." *See* SSR 83-12 ("Persons who can adjust to any need to vary sitting and standing by doing so at breaks, lunch periods, etc., would still be able to perform a defined range of work."). The DOT states that

> a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of these materials is negligible.

U.S. Dep't of Labor, DOT (4th ed. rev. 1991), App. C, *available at* 1991 WL 688702; *see also* 20 C.F.R. § 404.1567(b) (defining "light work" as requiring "a good deal of walking or standing," or "sitting most of the time with some pushing and pulling of arm or leg controls."). SSR 83-12 further provides that, if a person "must alternate periods of sitting and standing[,] . . . [she] is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work . . . or the prolonged standing or walking contemplated for most light work." SSR 83-12.

Here, the ALJ posed a hypothetical to the vocational expert based on the ALJ's residual functional capacity finding. The vocational expert testified that a person with this residual

functional capacity finding could work as a folder, DOT 369.687-018. (AR 88.) The vocational expert testified that the DOT classifies the folder job as light work, with 239,000 jobs in the national economy and 4,528 jobs in Washington State. *Id*. She also testified that her testimony was consistent with the DOT. (AR 89.)

Despite her testimony to the contrary, the vocational expert provided information that conflicted with the DOT without explanation. Plaintiff argues, and the Court agrees, since "light" DOT work requires "prolonged" standing and/or walking, testimony that a claimant can perform a "light" job that does not require prolonged standing and/or walking (i.e., standing and/or walking for no more than one hour) conflicts with the DOT. Because the vocational expert testified that her testimony was consistent with the DOT, the ALJ failed to properly follow the procedures of SSR 00-4p.

The Commissioner disagrees that there is a conflict between the vocational expert's testimony and the DOT, arguing that the DOT definitions of "sedentary" and "light" do not require standing or walking for more than one hour at a time, as provided in the vocational hypothetical. The Commissioner contends that the mandates of SSR 00-4p are limited to identifying and obtaining a reasonable explanation for any conflicts between the vocational expert's testimony and the DOT, and do not require the ALJ to inquire whether the vocational expert's testimony conflicts with the definitions of "sedentary" and "light" contained in SSR 69-9p and SSR 83-12. (Dkt. No. 22 at 15.)

However, as indicated above, the agency and the DOT use the same definitions for exertional categories of work. *See* 20 C.F.R. § 404.1567 ("we classify jobs as sedentary, light, medium, heavy, and very heavy. These terms have the same meaning as they have in

the Dictionary of Occupational Titles."). Furthermore, SSRs constitute Social Security Administration interpretations of the statute it administers and of its own regulations and are binding on ALJs. *See* 20 C.F.R. § 402.35(b)(1); *see also Paulson v. Bowen*, 836 F.2d 1249, 1252 n.2 (9th Cir. 1988) ("Once published, a ruling is binding upon ALJ's and is to be relied upon as precedent in determining cases where the facts are basically the same."). Accordingly, the Court rejects the Commissioner's argument that there is no conflict between the vocational expert's testimony and the DOT or that the ALJ is not required to follow SSR 69-9p and SSR 83-12.

As indicated above, under SSR 00-4p, an ALJ has an affirmative responsibility to inquire as to whether a vocational expert's testimony is consistent with the DOT and, if there is a conflict, determine whether the vocational expert's explanation for the conflict is reasonable. *Massachi*, 486 F.3d at 1152-54. SSR 00-4p also requires the ALJ to explain in the decision how she resolved the conflict. The ALJ failed to do so here. This failure prevents the Court from being able to determine whether substantial evidence supports the ALJ's step-five findings. *Massachi*, at 1153–54. The matter should thus be remanded so that the ALJ can perform the appropriate inquiries under SSR 00–4p.

Medical Opinion Evidence

Plaintiff next argues that the ALJ erroneously rejected the opinions of her treating orthopedic surgeon, Ralph Haller, M.D. (Dkt. No. 18 at 16-20.) As a matter of law, more weight is given to a treating physician's opinion than to that of a non-treating physician because a treating physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.

1989); *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating physician's opinion, however, is not necessarily conclusive as to either a physical condition or the ultimate issue of disability, and can be rejected, whether or not that opinion is contradicted. *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a treating or examining physician, the ALJ must give clear and convincing reasons for doing so if the opinion is not contradicted by other evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1988). "This can be done by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating [her] interpretation thereof, and making findings." *Id*. (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than merely state her conclusions. "[She] must set forth [her] own interpretations and explain why they, rather than the doctors', are correct." *Id*. (citing *Embrey v. Bowen*, 849 F.2d 418, 421–22 (9th Cir. 1988)). Such conclusions must at all times be supported by substantial evidence. *Reddick*, 157 F.3d at 725.

The opinions of examining physicians are to be given more weight than non-examining physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Like treating physicians, the uncontradicted opinions of examining physicians may not be rejected without clear and convincing evidence. *Id*. An ALJ may reject the controverted opinions of an examining physician only by providing specific and legitimate reasons that are supported by the record. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

Opinions from non-examining medical sources are to be given less weight than treating or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the opinions from such sources and may not simply ignore them. In other words, an ALJ must

evaluate the opinion of a non-examining source and explain the weight given to it. SSR 96–6p. Although an ALJ generally gives more weight to an examining doctor's opinion than to a non-examining doctor's opinion, a non-examining doctor's opinion may nonetheless constitute substantial evidence if it is consistent with other independent evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Orn*, 495 F.3d at 632–33.

In the present case, the ALJ evaluated Dr. Haller's opinions and gave them "great weight" in part and "less weight" in other part. (AR 23.) The ALJ noted that in May 2002, Dr. Haller indicated that plaintiff could perform light work, and in January 2004, he concluded that she has little to no permanent impairment regarding her elbows. (AR 23, 391, 421.) The ALJ noted that Dr. Haller was in the best position to assess plaintiff's limitations, and found his opinion consistent with his own findings and with the record in general. (AR 23.) However, the ALJ gave "somewhat less weight to Dr. Haller's May 2005 opinion that the claimant could not perform repetitive grasping or handling, could not stand for prolonged periods and could not kneel, crawl, or squat." (AR 23 (citing AR 514).) The ALJ explained that "[t]his opinion is not fully consistent with Dr. Haller's May 2005 objective findings that were almost entirely unremarkable: normal strength, grip, sensation, reflexes, gait, and gross/fine manipulation." *Id*. In addition, the ALJ found Dr. Haller's May 2005 opinion was not consistent with the overall findings in his progress notes. (AR 23.)

The ALJ noted that Dr. Haller performed surgery on plaintiff's left elbow in March 2003, and on her right elbow in February 2005. However, the ALJ found Dr. Haller's overall findings indicated minimal limitations, noting that before and after the surgeries, plaintiff exhibited normal elbow range of motion with no swelling or crepitus. (AR 22, 377-426.)

The ALJ also noted that Dr. Haller performed arthroscopic surgery on plaintiff's left knee in July 2002, and on her right knee in May 2003. However, the ALJ found Dr. Haller's overall findings indicated minimal limitations. (AR 22.) For example, the ALJ noted that "Dr. Haller noted tenderness in both knees but usually found normal gait, normal range of motion, no instability, and no effusions." *Id*.

The ALJ properly found Dr. Haller's 2005 assessment was inconsistent with his own objective findings and progress notes. Such a discrepancy is a specific and legitimate reason for not relying on the doctor's opinion regarding plaintiff's ability to perform repetitive grasping and handling, and stand for prolonged periods. "The ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory, and inadequately supported by clinical findings." *Thomas*, 278 F.3d at 957; *see also Batson v. Commissioner*, 359 F.3d 1190, 1195 (9th Cir. 2004) (a treating physician's opinions may be discounted when it is "in the form of a checklist, did not have supportive objective evidence, was contradicted by other statements and assessments of [the claimant's condition], and was based on [the claimant's] subjective descriptions of pain[,]" as well as when that opinion is "conclusory, brief, and unsupported by the record as a whole . . . or by objective medical findings[.]").

In addition, the ALJ properly found Dr. Haller's 2005 opinion was inconsistent with the opinions of medical expert Arthur Lorber, M.D., and examining orthopedists Thomas Trumble, M.D., Dhanvant Madhani, M.D., and James Champoux, M.D. (AR 23-24.) The ALJ noted that Dr. Lorber was the only orthopedist to review the entire record and his opinions were consistent with the objective findings. (AR 23.) The ALJ also noted that Dr. Trumble

"concluded that the claimant's knee and elbow impairments did not cause any specific limitations." (AR 23, 506.) The ALJ further noted that "Dr. Madhani concluded that the claimant's bilateral elbow impairment caused no significant functional limitations, an opinion consistent with his unremarkable findings that included normal muscle strength and full, pain-free range of motion in both elbows." (AR 24, 444-48.) In addition, the ALJ noted that "Dr. Champoux concluded that the claimant's knee impairments caused few limitations, noting that she should avoid repetitive kneeling and squatting but could lift 25 to 30 pounds." (AR 24, 452-55.)

Plaintiff argues that there is no requirement that a physician's opinion be "fully consistent" with his objective findings for that opinion to be "fully respected as that of a treating physician or treating specialist." (Dkt. No. 18 at 18-19.) Plaintiff contends that the ALJ did not follow the Ninth Circuit's treating physician rule or the correlative regulatory treating physician rule, given the length of treatment and Dr. Haller's expertise as an orthopedic surgeon. *Id*. (citing 20 C.F.R. § 404.1527(c)(3)-(6)). However, the treating physician rule does not require an ALJ to accept a treating physician's opinion which is brief, conclusory, and unsubstantiated by relevant medical evidence. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Johnson*, 60 F.3d 1432; *see also* 20 C.F.R. § 404.1527(c)(4) ("Generally, the more consistent an opinion is with the record as a whole, the more weight we will give to that opinion."). Where a treating physician's conclusions about a claimant's functional limitations "are not supported by his own treatment notes," the ALJ may reject that opinion. *See Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir. 2003); *see also Johnson*, 60 F.3d at 1433 (same). The ALJ provided specific and legitimate reasons supported by

substantial evidence in the record for giving great weight to Dr. Haller's 2002 and 2004 opinions while affording less weight to his May 2005 opinion. Because the ALJ provided specific and legitimate reasons supported by substantial evidence for rejecting Dr. Haller's opinion, the ALJ did not err.

Plaintiff argues that the ALJ erred by "apparently [giving] more weight to non-examining medical expert Dr. Lorber's testimony based on his expertise as an orthopedic surgeon than to Dr. Haller's May 2005 opinions." (Dkt. No. 18 at 19.) Contrary to plaintiff's assertion, the ALJ did not find Dr. Lorber had greater expertise than Dr. Haller. Rather, the ALJ gave significant weight to Dr. Lorber's opinion because he was the only orthopedist to have reviewed the entire record and his opinions were consistent with the objective findings. (AR 23.)

Plaintiff also argues that the ALJ erred by giving significant weight to Dr. Madhani's opinion. Plaintiff argues that although Dr. Madhani opined that plaintiff "should probably have lifting restriction of 10 pounds," the ALJ found plaintiff could lift 10 pounds frequently and 20 pounds occasionally. (Dkt. No. 18 at 19.) However, when read in full and in context, Dr. Madhani's opinion was consistent with the ALJ's findings. Dr. Madhani stated, "The claimant is capable of reasonably continuous employment. Based on the subjective nature of the symptoms, she should probably have lifting restriction of 10 pounds. A Physical Capacities Evaluation is recommended and would probably be helpful." (AR 448.) However, as the ALJ noted, Dr. Madhani also found plaintiff's subjective complaints were out of proportion to the objective findings, which were almost entirely normal. (AR 23, 444-48.) Accordingly, the ALJ did not err by giving significant weight to Dr. Madhani's opinion.

Finally, plaintiff argues that "[t]he ALJ apparently gave weight to medical expert Dr. Lorber's testimony ([A]R at 23), but Dr. Lorber's testimony was expressly based on his belief that [plaintiff] was not credible."[3] (Dkt. No. 18 at 20.) Plaintiff cites a decision from the Seventh Circuit which criticized an ALJ's adverse credibility determination that was based, in part, on the opinion of a non-examining medical expert who expressed skepticism about the severity of claimant's symptoms. *Shauger v. Astrue*, 675 F.3d 690, 698 (7th Cir. 2012). There, the Court found, although the ALJ gave great to the medical expert's opinion, the medical expert had no experience with patients afflicted with claimant's impairment, had no knowledge of the severity of symptoms associated with the impairment, had not examined the claimant, did not address the testing conducted, and offered no medical reason for doubting claimant's statements. *Id*. The Court thus concluded substantial evidence did not support the ALJ's credibility determination. *Id*.

Here, however, Dr. Lorber based his opinion on his expertise and experience as an orthopedic surgeon, on his review of the entire record, and on the objective medical findings. (AR 23, 42-44, 47-54.) Furthermore, unlike the medical expert in *Shauger*, Dr. Lorber offered medical reasons for doubting plaintiff's statements. *Id*. The ALJ properly relied on Dr. Lorber's medical opinions.

Obesity

Plaintiff argues that the ALJ erroneously failed to evaluate her obesity. (Dkt. No. 18 at 21-22.) She asserts that she had obesity at all relevant times, but the ALJ did not mention that

3 Dr. Lorber testified, "There are significant secondary factors going on here throughout the course of her treatment and so forth and I do not believe that her pain level can be justified by the pathology present . . . I doubt her credibility, but that is an area that will be reserved for the judge to determine." (AR 47-48.)

fact in her written decision or address the impact of her obesity on her knee condition or her ability to stand and walk. *Id*. The Commissioner argues that the ALJ did not need to address plaintiff's obesity because there was no evidence plaintiff's obesity caused any functional limitations or exacerbated any of her other impairments. (Dkt. 22 at 6.) The Commissioner asserts that the ALJ carefully considered "the entire record," including the opinions of Dr. Champoux, who noted plaintiff was obese but concluded plaintiff's knee impairments caused few limitations. *Id*. at 6 (citing AR 451, 454.)

As argued by the Commissioner, there is no evidence in the record, and plaintiff has not set forth any, which indicates that plaintiff's obesity limits her functioning. While plaintiff's treating and examining physicians were aware of her obesity, the medical record is silent as to whether and how plaintiff's obesity may have exacerbated her condition. The fact that plaintiff is obese does not by itself establish functional limitations and restrictions. As plaintiff has not identified any functional limitations due to obesity which would have impacted the ALJ's analysis, the Court finds no error. *See Burch v. Barnhart*, 400 F.3d 676, 684 (9th Cir. 2005).

Plaintiff next asserts that "[t]he ALJ gave significant weight to medical expert Dr. Lorber's testimony who disavowed any expertise in obesity." (Dkt. No. 18 at 22, Dkt. No. 23 at 7.) However, a review of the record shows Dr. Lorber had appropriate expertise and properly considered plaintiff's obesity.

At the hearing, Dr. Lorber testified, "I'm aware of [plaintiff's] morbid obesity. She is 5'6" and weighs 305 pounds. I have considered the affect of her morbid obesity upon her knee condition." (AR 43.) On subsequent examination of the medical expert by the attorney,

plaintiff's counsel asked Dr. Lorber,

> Q And according to the National Institute of Health, doctor, there are three levels of obesity, are there not.[4]
>
> A I'm not an obesity expert. All I can tell you that as an orthopedic surgeon, given her height and weight, I would call her morbidly obese. I can't be anymore specific than that. I'm an orthopedic surgeon, I'm not a bariatric physician.
>
> Q Okay. So I believe she falls in the category of extreme under the National Health Institute and that can affect a person's ability to stand and walk, right?
>
> A I'm not going to testify whether it's extreme or not. I testified that she has morbid obesity. Now I'm not familiar with the grading system that you're discussing and I cannot testify about it.

(AR 52.) The ALJ interrupted,

> ALJ I don't understand what the initial question is. If you're asking what impact morbid obesity has on these impairments, that's a fair question. I think he's already said he took it into account in the RFC, but if you want to ask again, then do so because that's really the question here whether he considered her morbid obesity in her orthopedic impairments.
> . . .
> Doctor, have a number of the patients that you have treated over the many years that you have been [in] practice been obese?
>
> A Indeed they have.
>
> ALJ All right. And they have been obese to the extent that Ms. Rodriguez is obese?
>
> A That is correct.

---

4 SSR 02-1p states, "The Clinical Guidelines recognize three levels of obesity. Level I includes BMIs of 30.0-34.9. Level II includes BMIs of 35.0-39.9. Level III, termed "extreme" obesity and representing the greatest risk for developing obesity-related impairments, includes BMIs greater than or equal to 40. These levels describe the extent of obesity, but they do not correlate with any specific degree of functional loss."

ALJ So you have firsthand knowledge of what obesity – what type of impact obesity has on these types of impairments?

A I believe I do.

ALJ All right. . . . I don't know what else would be relevant for these purposes.

(AR 53-55.) Accordingly, the Court finds Dr. Lorber had proper expertise. Moreover, as the Commissioner points out, the ALJ also gave significant weight to the opinions of examining orthopedic surgeons Dr. Trumble and Dr. Champoux, who also noted plaintiff's obesity and concluded that plaintiff's knee impairments caused few limitations. (AR 23-24, 451, 454, 505-506.) The ALJ did not err in relying on Dr. Lorber's opinion.

Reopening

Finally, plaintiff argues that the ALJ *de facto* reopened the initial denial of her prior application for benefits plaintiff made in April 2005. (Dkt. No. 18 at 22-23.) Pursuant to 20 C.F.R. § 404.988, the Commissioner may reopen and revise an otherwise final and binding decision "[w]ithin 12 months of the date of the notice of the initial determination, for any reason[,]" "[w]ithin four years of the date of the notice of the initial determination if [the Commissioner] find[s] good cause, as defined in § 404.989, to reopen the case[,] or" "[a]t any time" under certain specified conditions. *See* 20 C.F.R. §§ 404.988(a)-(c). The Commissioner contends that the ALJ did not state that she reopened the prior decision, nor did she find any required condition for reopening satisfied under 20 C.F.R. § 404.988. (Dkt. No. 22 at 16.) The Court, however, agrees with plaintiff.

"[W]here the Commissioner considers 'on the merits' the issue of the claimant's disability during the already adjudicated period," then 'a *de facto* reopening' will be deemed to

have occurred, and "the Commissioner's decision as to the prior period [will be] subject to judicial review." *Lester*, 81 F.3d at 827. When adjudicating plaintiff's 2008 application, the ALJ considered on the merits the issue of plaintiff's disability with an onset date of December 14, 2001, the same onset date alleged in the 2005 application. (AR 172, 177.) As the two applications have the same alleged onset date and thus involve the assessment of disability over the same period, the Court concludes the ALJ *de facto* reopened the prior application.

IV. CONCLUSION

For the foregoing reasons, the Court recommends that the Commissioner's decision be REVERSED and REMANDED for further administrative proceedings. A proposed order accompanies this Report and Recommendation.

DATED this 27th day of December, 2012.

Mary Alice Theiler
United States Magistrate Judge